MOTION FILED FEB 12 1952

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 353 MISC. ORIGINAL

In the Matter

of the

Petition of the GLORIA O TOWING CORPORATION for a writ of prohibition and/or a writ of mandamus, against the Honorable MORTIMER W. BYERS, Judge of the District Court of the United States for the Eastern District of New York, and all other Judges and officers of said Court, and for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI, PETITION AND BRIEF IN SUPPORT

EDMUND F. LAMB,
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Bowne & Co., Inc., 163 Front Street, New York 38

TABLE OF CONTENTS

PAGE

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI 1

PETITION FOR A WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI 3

BRIEF IN SUPPORT OF PETITION 11

POINT I.—Admiralty never has had jurisdiction over suits for damage to things attached to the land .. 11

POINT II.—Congress may not extend admiralty jurisdiction beyond constitutional limits 13

POINT III.—Respondent cannot be deprived of its constitutional right to a jury trial 15

POINT IV.—*Erie Railroad* v. *Tompkins*, 305 U. S. 64, guarantees to petitioner the protection of the New York Rule which makes contributory negligence a complete bar to recovery 17

POINT V.—A writ of mandamus or prohibition is the proper remedy herein 20

CONCLUSION 22

APPENDIX 23

CASES CITED

PAGE

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 401 ... 19
Belden v. Chase, 150 U. S. 674 18
Belfast, The v. Boon, 7 Wall. 624 13
Bereslansky v. Caffey, 161 Fed. (2d) 499 20
Boles v. Munson Steamship Lines, 260 N. Y. 516 17

Cleveland Terminal Co. v. Cleveland Steamship Co., 208 U. S. 316 11
Crowell v. Benson, 285 U. S. 53, 55 ..... 4, 13

Detroit Trust Co. v. Steamer Thomas Barlum, 293 U. S. 2. 44 ..... 13, 14

Eagle, The, 75 U. S. 15 16
Erie Railroad v. Tompkins, 304 U. S. 64 ..... 18, 20
Ex parte Muir, 254 U. S. 522 2
Ex parte Phoenix, 118 U. S. 610 12
Ex parte Republic of Peru, 318 U. S. 578 2
Ex parte United States, 319 U. S. 730 2

Genesee Chiefs, The v. Henry Fitzhugh, 12 How. 443 15

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation, 1/14/52 Oct. Term 1951 18

Johnson v. Chicago Elevator Co., 119 U. S. 388 12
Johnson v. United States Shipping Board, 24 Fed. (2d) 963 18

Land v. Dollar, 330 U. S. 730 ..... 2, 21

Maleeny v. Standard Ship, 237 N. Y. 250 17
Martin v. West, 222 U. S. 191 12
Matter of Skinner & Eddy Corporation, 265 U. S. 85 20

Nippon Yusen Kabushiki Kaisha v. Great Western Power Co., 274 U. S. 745 12

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U. S. 36 14

Panama Railroad Co. v. Johnson, 264 U. S. 375 13
Panoil, The, 266 U. S. 433 12
Plymouth, The, 3 Wall. 20 11

PAGE

Port of New York v. Castagna, 167 Fed. (2d) 352, 355 18
Poughkeepsie, The, 212 U. S. 558 12
Prince Line, Ltd. v. American Paper Exports, 55 Fed. (2d) 1053 ..... 4, 6, 17

Richardson v. Harmon, 222 U. S. 96 ..... 14, 15

Sampson v. Channel, 110 Fed. (2d) 755 18

Troy, The, 208 U. S. 321 12

United States of America v. Wm. H. Kirpatrick, 186 Fed. (2d) 393 21
United States v. General Motors Corporation, 323 U. S. 373 ..... 2, 21
United States v. The John R. Williams, 144 Fed. (2d) 451 ..... 4, 6, 12, 17

STATUTES CITED

Federal Rule of Civil Procedure No. 38 ..... 4, 6

Public Law 695 4

Title 28, U. S. Code:
Sec. 725 18
Sec. 1254 ..... 1, 4
Sec. 1651 ..... 1, 3
Sec. 1873 16

46 U. S. Code 740 4

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI

Now comes Gloria O. Towing Corporation and moves:

1. For leave to file the petition for a writ of prohibition or mandamus, or both, hereto annexed, under Section 1651 of Title 28 of the United States Code;

2. That said petition, which includes an appropriate prayer therefor, be considered also as a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit under Section 1254 of Title 28, United States Code;

3. That a rule be entered and issued directing the District Court of the United States for the Eastern District of New York and the Honorable MORTIMER W. BYERS, a Judge thereof, and the other Judges and officers of said Court, to show cause why such writs should not issue, in accordance with the prayer of said petition, and why the petitioner should not have such other and further relief therein as may be just.

The petition for a writ of prohibition or mandamus, or both, referred to in paragraph 1, *supra*, appears to be the proper mode of challenging the jurisdiction of the District Court when proceeding in Admiralty, *Ex parte Republic of Peru*, 318 U. S. 578 *and Ex parte United States*, 319 U. S. 730, particularly where, as here, application for the writ was made to the United States Court of Appeals, which declined to entertain the application. *Ex parte Muir*, 254 U. S. 522, 534;

The petition for a writ of certiorari, referred to in paragraph 2, *supra*, is added in the event that this Court should wish to consider separately the refusal of the United States Court of Appeals for the Second Circuit to exercise its jurisdiction and to grant prohibition or mandamus, or both, in the circumstances here presented. Certiorari under subdivision 1 of Section 1254, Title 28, United States Code is appropriate because, although the order of the Court of Appeals is not a final judgment, it presents "an issue 'fundamental to the further conduct of the case'."

Footnote 2. *Land* v. *Dollar*, 330 U. S. 730, 734; *United States* v. *General Motors Corporation*, 323 U. S. 373.

EDMUND F. LAMB,
Attorney for Petitioner,
Gloria O Towing Corporation.

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PETITION FOR A WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI.

The petition of Gloria O Towing Corporation for a writ of prohibition or a writ of mandamus, or both, against the Honorable MORTIMER W. BYERS, Judge of the District Court of the United States for the Eastern District of New York and against the other Judges and officers of said Court, and for a writ of certiorari to the United States Court of Appeals for the Second Circuit, respectfully shows:

FIRST: The jurisdiction of this Court under Section 1651 of Title 28, United States Code, to issue a writ of prohibition and/or a writ of mandamus, or both, to the United

States District Court for the Eastern District of New York is hereby invoked.

SECOND: There is likewise hereby invoked the jurisdiction of this Court under Section 1254 of Title 28, United States Code, to review by writ of certiorari the decision of the United States Court of Appeals for the Second Circuit which denied petitioner's motion for relief.

THIRD: The questions presented are:

1. Did the 80th Congress, Second Session, in enacting Public Law 695 (46 United States Code 740 * * * entitled "Extension of Admiralty and Maritime jurisdiction")* "reach beyond the constitutional limits which are inherent in the Admiralty and Maritime jurisdiction of the Federal Courts?" *Crowell* v. *Benson,* 285 U. S. 53, at page 55.

2. Can Public Law 695 of the 80th Congress, Second Session, 46 United States Code 740, be employed to deprive a litigant of its constitutnonal right to a jury trial and the defense of contributory negligence as a complete bar under New York Law? If the answer is in the affirmative did the Congress have power to deprive a litigant of such rights by legislation? The day before this Statute became Law, any litigant was entitled to a jury trial of issues such as are presented in the suit herein, in the District Court. *United States* v. *The John R. Williams,* 144 Fed. (2d) 451, at 454; *Prince Line, Ltd.* v. *American Paper Exports,* 55 Fed. (2d) 1053, at 1057; Federal Rule of Civil Procedure No. 38.

FOURTH: The questions are of importance because they affect a large body of litigation. The Statute which at-

*Text printed at page 23 hereof.

tempts to enlarge Admiralty jurisdiction is revolutionary procedurally because it enables one whose property on land has been damaged to assert a maritime lien on a vessel and to seize that vessel under Admiralty Process. Absent the aforementioned Statute there would be no color of authority for such procedure.

FIFTH: A large body of litigation which prior to the enactment of the aforementioned Statute could only be conducted in the Civil side of our Courts, now appears to be cast into Admiralty. Thus trial by jury, common law defenses, examinations of adversaries orally and other practices provided for by the Federal Rules of Civil Procedure will not be available to respondents who are forced to defend in the forum selected by their adversaries.

SIXTH: On or about August 5th, 1950, American Bridge Company, a New Jersey corporation, filed in the United States District Court for the Eastern District of New York, a libel in Admiralty against the Tug *Gloria O* in rem and against the Gloria O Towing Corporation, a New York corporation, in personam (Record, p. 8).

SEVENTH: The libel aforementioned alleges that the libellant owned a bridge in the process of being built across the New York State Barge Canal near Jordan, New York, and that on the morning of May 10th, 1950, the Tug *Gloria O* with a barge in tow negligently collided with bridge supports causing damage to the bridge and to the supports. The libel prays that process be issued in rem against the tug and in personam against the tug's owners.

EIGHTH: The petitioner was required to and did file in the District Court a Surety Company undertaking in the sum of $17,500 in lieu of the seizure of the Tug *Gloria O* under Court Process, and that stipulation is still in full force and effect.

NINTH: The petitioner has filed claim to the tug as owner and filed a notice of appearance.

TENTH: On or about January 23rd petitioner filed in the United States District Court for the Eastern District of New York its answer to the libel herein and on the face of the said answer demanded a jury trial.

ELEVENTH: The aforementioned answer to the libel expressly denies the Admiralty and Maritime jurisdiction of the United States and of the District Court and affirmatively alleges that the bridge supports, cribbing, piling and other material referred to in the libel, blocked, impeded and embarrassed navigation, were an unlawful obstruction to navigation, were in violation of law and without legal authority and that the libellant assumed the risk of any damage to these objects. The aforementioned answer concludes "WHEREFORE, claimant-respondent prays that the issues in this action be tried before a jury and that the libel be dismissed together with costs and disbursements."

TWELFTH: Petitioner's practice of demanding a jury trial while the case was in Admiralty was compelled not only by Federal Rule of Civil Procedure No. 38 but also by decisions of the United States Court of Appeals for the Second Circuit in *United States* v. *Tug John R. Williams*, 144 Fed. (2d) 451 at 454 and *Prince Line, Ltd.* v. *American Paper Exports*, 55 Fed. (2d) 1053 at 1057. Despite this compulsion, the Clerk of the United States District Court for the Eastern District of New York refused to accept for filing the said answer to the libel on the ground that there was no provision in Admiralty for demanding a jury trial. Thereafter by application to the Honorable ROBERT A. INCH, Senior Judge, the Clerk was directed to file the said answer but petitioner was requested to press its quest for a jury trial by suitable motion.

THIRTEENTH: On May 23rd, 1951, petitioner made a motion before District Judge MORTIMER W. BYERS for an order dismissing the libel as against the Tug *Gloria O* and discharging and cancelling the stipulation for value filed by the claimant of the tug as security for the tug, for an order directing the libel against the respondent Gloria O Towing Corporation to be treated as a complaint in law and transferring the case from the Admiralty calendar to the Civil Jury Trial calendar and for such other and further relief in the premises as may be just and proper.

FOURTEENTH: Under date of June 18th, 1951, the District Court filed its decision and opinion in writing and denied the aforementioned motion in all respects (Rec., p. 18—98 Fed. Supp. 71). Under date of July 2nd, 1951, an order was entered, which denied the said motion (Rec., p. 23).

FIFTEENTH: Petitioner represents that at the time of the adoption of the Constitution of the United States, claims for damage to structures or things attached to the land were not within the Admiralty jurisdiction and such claims down to and including the present time continue to be outside of the Admiralty jurisdiction. Petitioner believes that the Congress had no power under the Constitution of the United States either to enlarge the jurisdiction of Admiralty or to deprive petitioner of its right to a jury trial nor did the Congress ever have nor does it now have power or authority to deprive petitioner of its defenses of contributory negligence and assumption of risk as complete bars to the instant action under New York Law.

SIXTEENTH: Petitioner, on or about July 25, 1951, filed a petition in the United States Court of Appeals for the Second Circuit and moved for a writ of prohibition and/or mandamus against the Judges of the United States District Court for the Eastern District of New York sub-

stantially on the grounds herein stated and the said proceedings came on to be heard in the said Court of Appeals before the Honorable THOMAS W. SWAN, JEROME N. FRANK and ALFRED C. COXE on November 5th, 1951. During the course of oral argument the Court indicated that petitioner probably should defend the suit in Admiralty in the District Court and thereafter appeal if aggrieved. The Court reserved decision but by order dated November 15th, 1951, denied the motion without opinion (Rec., p. 25).

SEVENTEENTH: Petitioner fears that if it should proceed to trial in Admiralty without a jury in the instant matter, as the Court of Appeals orally suggested, petitioner will have waived its right to a jury trial thereby. Petitioner's only other alternative is to stand mute at the trial in Admiralty and thereby expose itself to the entry of a decree in favor of the libellant against it at the same time forfeiting its right to litigate the facts. Only by the instant review of the decisions of the lower Courts can petitioner preserve its constitutional right to a jury trial and preserve the complete defense of contributory negligence afforded to it under New York Law.

EIGHTEENTH: The District Court has ruled herein that petitioner may not employ and invoke Federal Rule of Civil Procedure No. 26 to examine the libellant orally before trial as an adverse party.

WHEREFORE, petitioner respectfully prays:

1. That a writ of prohibition may issue out of this Honorable Court to the said MORTIMER W. BYERS, Judge of the United States District Court for the Eastern District of New York and the other Judges and officers of said Court, prohibiting him and them from taking any step whatsoever in the cause aforesaid and, generally from the further exercise of

jurisdiction herein or the enforcing of any order, judgment or decree made under color thereof.

2. That a writ of mandamus may issue out of this Honorable Court directing and commanding the Honorable MORTIMER W. BYERS, Judge of the District Court of the United States for the Eastern District of New York and/or the other Judges of said Court, to vacate the order entered by direction of the said Honorable MORTIMER W. BYERS denying petitioner's motion to dismiss the libel, to discharge the stipulation for value and to transfer the case from the Admiralty calendar to the Civil Jury Trial calendar, and to enter an order granting to petitioner the said relief.

3. That the Court grant to the petitioner such other and further relief as may be just in the premises, including a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its order of November 15th, 1951, denying the motion of Gloria O Towing Corporation for a writ of prohibition and/or a writ of mandamus.

EDMUND F. LAMB,
Attorney for Petitioner,
Gloria O Towing Corporation.

State of New York, }
County of New York, } ss.:

EDMUND F. LAMB, being first duly sworn, deposes and says:

I am the Attorney for the Petitioner herein and have read the foregoing petition and know the contents thereof. I am familiar with the proceedings in the United States District Court for the Eastern District of New York and in the United States Court of Appeals for the Second Circuit to which reference is made in the said petition. The statements of fact contained in the foregoing petition are true to the best of my knowledge, information and belief.

EDMUND F. LAMB.

Sworn to before me this
8th day of February, 1952.

ANTHONY B. CATALDO,
Notary Public, State of New York.
No. 41-5650500.
Qualified in Queens County.
Certificates filed in Clk's & Reg. Offices
of Queens, Kings, & N. Y. Counties.
Commission Expires March 30, 1952.

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BRIEF IN SUPPORT OF PETITION

POINT I.

Admiralty never has had jurisdiction over suits for damage to things attached to the land.

Time and again this Court has ruled that Admiralty has no jurisdiction over suits to recover for damage to objects attached to the land even where the objects lay in or under a navigable stream and even though the damage was caused by a vessel afloat.

The Plymouth, 3 Wall. 20 (Pier damage);
Cleveland Terminal Co. v. *Cleveland Steamship Co.*, 208 U. S. 316 (Center Pier of Bridge);

The Poughkeepsie, 212 U. S. 558 (Pipe for borings);

Ex parte Phoenix, 118 U. S. 610 (Building afire from ship's sparks);

Johnson v. *Chicago Elevator Co.,* 119 U. S. 388 (Elevator damaged by ship's overhang);

The Troy, 208 U. S. 321 (Bridge damaged by ship);

Martin v. *West,* 222 U. S. 191 (Bridge damaged by ship);

The Panoil, 266 U. S. 433 (A dike which assisted navigation, damaged by a ship).

This Court has denied certiorari in many cases which attempted to reopen the question. *United States* v. *Tug John R. Williams,* 323 U. S. 782; (Telephone cable); *Nippon Yusen Kabushiki Kaisha* v. *Great Western Power Co.,* 274 U. S. 745 (Cables).

In summing up the effect of the decisions of this Court the United States Court of Appeals for the Second Circuit, in 1944, in denying Admiralty jurisdiction over a suit to recover for damage to telephone cables said in *United States* v. *The John R. Williams,* 144 Fed. 451, at page 454:

> "Because the decisions of the Supreme Court preclude resort to a court of admiralty in a case like the present, we hold that the libellant's claim in so far as it involves the imposition of a maritime lien, in favor of the libellant, upon the tug *John R. Williams* should be dismissed and the decree against her vacated."

POINT II.

Congress may not extend admiralty jurisdiction beyond constitutional limits.

In *Detroit Trust Co.* v. *Steamer Thomas Barlum*, 293 U. S. 21, at page 44, this Court said:

> "But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction."

In *Crowell* v. *Benson*, 285 U. S. 53, at page 55, this Court said:

> "In amending and revising the maritime law, Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction of the Federal Courts."

In *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, this Court said, at page 386:

> "When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without."

In *The Belfast* v. *Boon*, 7 Wall. 624, at page 641, this Court said:

> "Judicial power to hear and determine controversies in admiralty, like other judicial power, was conferred upon the Government of the United States by the Federal Constitution, and by the express terms

> of the instrument, it extends to all cases of admiralty and maritime jurisdiction; which, doubtless, must be held to mean all such cases of a maritime character as were cognizable in the Admiralty Courts of the States at the time the Constitution was adopted."

From the foregoing quotations it is at once clear that Congress has no power to enlarge the Admiralty jurisdiction beyond that which existed at the time of the adoption of the Constitution of the United States. Certainly Congress cannot enlarge admiralty jurisdiction in derogation of a right to a jury trial or the right to protection under State Laws.

The District Court in its opinion herein has failed to recognize the distinction between Congressional acts which change procedure in admiralty and the instant act which attempts to enlarge admiralty jurisdiction. The cases commented on by the District Court (Rec., p. 20), *Detroit Trust Co., Trustee* v. *The Thomas Barlum et al.*, 293 U. S. 21, sustaining the Ship Mortgage Act; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, sustaining the Jones Act and the *Richardson* v. *Harmon*, 222 U. S. 96, sustaining the limited liability Statute even as to non-maritime torts, all involved matters over which Admiralty already had jurisdiction. In connection with the Ship Mortgage Act, Congress was regulating commerce and was assisting shipping over which the Federal Government already had jurisdiction. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, although involving a recovery under the Jones Act by a seaman injured while ashore in performing his duties in discharging cargo, sustained admiralty jurisdiction because of the employer-employee relationship and because the injured seaman was engaged as a servant in a maritime occupation. This Court pointed out at page 41, that although admiralty usually has jurisdiction only in connection with things occurring on navigable water,

yet "From its dawn, the maritime law has recognized the seaman's right, to maintenance and cure for injuries suffered in the course of his service to his vessel whether occurring on sea or on land". Giving an injured seaman rights under the Jones Act for injuries on land in the course of his employment, therefore, was not an enlargement of admiralty jurisdiction, but a supplementing of the right to maintenance and cure. The limitation of liability Statute dealt with in *Richardson* v. *Harmon*, obviously concerned a matter already within the jurisdiction of admiralty, namely, the limitation and adjudication of claims against a ship and its owner. The Limitation Statute was in accordance with Congressional power to regulate commerce.

In none of these last mentioned cases which simply changed separate phases of procedure, was the constitutional right to a jury trial raised or discussed.

POINT III.

Respondent cannot be deprived of its constitutional right to a jury trial.

Amendment VII of the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

In *The Genesee Chiefs* v. *Henry Fitzhugh, et al*, 12 How. 443, this Court had before it a problem somewhat analagous to the instant one. It dealt with the 1845 Statute which enlarged the admiralty jurisdiction so as

to include claims arising on the Great Lakes (non-tidal waters). The constitutionality of the Statute was attacked. The Statute specifically provided that any party to a litigation arising under the Statute could demand a jury trial as a matter of right in the Admiralty Courts. This Court sustained the constitutionality of the Statute and discussed at some length the enlargement of admiralty jurisdiction in England. The Court said, at page 459:

> "The principal objection made to the admiralty jurisdiction is the want of the trial by jury. And it is this feature in the admiralty practice which made it the object of so much jealousy in England in the time of Lord Coke, and enabled him to succeed in his efforts to restrict it to very narrow limits. * * * But the Act of Congress of which we are speaking is free from the objection to which the English Statute is liable. Like the English Statute, it saves to the party a concurrent remedy at common law in any Court of the United States or of a state which may be competent to give it. But it goes farther. It secures to the parties the trial by jury as a matter of right in the admiralty courts. Either party may demand it. And it thus effectually removes the great and leading objection, always heretofore made to the admiralty jurisdiction."

Although this Court in *The Eagle*, 75 U. S. 15, soon held that the 1845 Statute was unnecessary and that Admiralty always had had jurisdiction over non-tidal waters, so much of the Statute which provides for jury trials has continued to stand on the Statute Books even to this day. 28 U. S. C. 1873 as revised in 1949, (formerly 28 U. S. C. 770) provides:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navi-

gation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it."

Conceivably, this statute might provide added reason to give petitioner a jury trial herein.

The United States Court of Appeals for the Second Circuit twice has ruled that if suit improperly is instituted in Admiralty to recover for damage to a land structure a jury trial must be demanded in the Admiralty suit otherwise it is waived.

United States v. *The John R. Williams*, 144 Fed. (2d) 451 at 454;
Prince Line, Ltd. v. *American Paper Exports*, 55 Fed. (2d) 1053 at 1057.

Thus the United States Court of Appeals recognized as late as 1944 in *United States* v. *The John R. Williams* the inviolate right of a respondent in Admiralty to have a jury trial when sued for damage to a land structure. This right cannot be taken away by Congressional Act.

POINT IV.

***Erie Railroad* v. *Tompkins*, 304 U. S. 64, guarantees to petitioner the protection of the New York Rule which makes contributory negligence a complete bar to recovery.**

In New York, contributory negligence is a complete bar to recovery and damages cannot be apportioned. *Boles* v. *Munson Steamship Lines*, 260 N. Y. 516; *Maleeny* v. *Standard Ship*, 237 N. Y. 250. The New York Rule must be and has been followed in Federal Courts.

28 United States Code 725;
Johnson v. *United States Shipping Board,* 24 Fed. (2d) 963, repudiating *Port of New York* v. *Castagna,* 280 Fed. 618;
Guerrini v. *United States,* 167 Fed. (2d) 352 at 355.

See also:

Sampson v. *Channel,* 110 Fed. (2d) 755;
Belden v. *Chase,* 150 U. S. 674.

This Court recently re-enunciated the well-established rule that in Admiralty contributory negligence is not a bar to recovery. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corporation,* January 14th, 1952, October Term 1951, Nos. 62 and 197. "Where two vessels collide due to the fault of both, it is established Admiralty Doctrine that mutual wrongdoers shall share equally the damages sustained by each * * *." Thus by being held in Admiralty petitioner loses the protection of the New York rule that contributory negligence is a complete bar.

This Court set at rest any question regarding the application in Federal Courts of the defense of contributory negligence according to State Law in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, where this Court said, at page 77:

> "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.
>
> THIRD: Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest

court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S. 368, 401, 37 L. ed. 772, 786, 13 S. Ct. 914, against ignoring the Ohio common law of fellow servant liability: 'I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissable except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.' "

The language employed in *Erie* v. *Tompkins* establishes that Congress did not have power to deprive petitioner of the defense of contributory negligence as a total bar to the suit below according to New York Law.

POINT V.

A writ of mandamus or prohibition is the proper remedy herein.

The action of the District Court herein in refusing to honor petitioner's demand for a jury trial is tantamount to the performance by the District Court of an act not authorized by law, namely, the expunging from the record of the demand for a jury.

In *Bereslavsky* v. *Caffey*, 161 Fed. (2d) 499, the United States Court of Appeals for the Second Circuit issued a writ of mandamus and directed the District Court to vacate an order which struck out a demand for a jury trial.

Where this Court felt that the action of a Court below operated to deprive a litigant of its right to a jury trial it issued a writ of mandamus. In *Matter of Skinner & Eddy Corporation*, 265 U. S. 85, this Court said, at page 95:

> "It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedical process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. * * * It would be a useless waste of time and effort to enforce a trial in the court of claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated. Added to this is the consideration which has been regarded as furnishing a substantial ground for the

extraordinary process of the writ that the petitioner, by a denial of his right to dismiss in the court of claims, will be deprived of a right of trial by jury in the state court of Washington. * * *

Write absolute."

In *United States of America* v. *William H. Kirkpatrick*, 186 Fed. (2d) 393, mandamus was issued compelling a District Judge to vacate many orders referring Admiralty cases to Commissioners to hear and report to the Court. Since the Commissioners' reports would carry with them a presumption of correctness, the Court of Appeals said that the issuance of the orders was beyond the power of the Court and a writ of prohibition and mandamus was granted.

Petitioner is in a dilemma, being the first reported victim in Admiralty of the newly enacted Statute attempting to enlarge Admiralty jurisdiction. Petitioner has been unable to induce the United States Court of Appeals for the Second Circuit to make a ruling for the further conduct of the case in the District Court. The Court of Appeals indicated on oral argument that the case should be tried, and then an appeal can be taken if petitioner is so advised. Under that procedure petitioner must determine whether to stand mute in the Admiralty Court and thus not waive its right to a jury trial and protection under New York Law. This would mean the virtually automatic entry of a decree holding it liable. If petitioner tries the case on the issues it runs the risk of being held to have waived its constitutional rights.

Since the "Extension of Admiralty Jurisdiction" Statute is a radical departure from well-established Law, and since it revolutionizes procedure, it would appear that this Court should determine these issues "fundamental to the further conduct of the case" as was done in *Land* v. *Dollar*, 333 U. S. 730, 734 and *United States* v. *General*

Motors Corporation, 323 U. S. 373. Petitioner should not be required to submit to a default judgment in order to obtain its day in court as guaranteed by our Constitution.

Conclusion.

For the reasons stated it is respectfully submitted that the petition for a writ of prohibition and/or mandamus, or in the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Petitioner,
Office and P. O. Address,
80 Broad Street,
New York 4, New York.

Of Counsel:

VINCENT A. CATOGGIO
and
PURDY, LAMB & CATOGGIO,
New York City.

Appendix.

Title 46, United States Code, Section 740 reads as follows:

> "Sec. 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.
>
> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496."

NO. 353 MISC.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter
of the
Petition of the GLORIA O TOWING CORPORATION for a writ of prohibition and/or a writ of mandamus, against the Honorable Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York, and all other judges and officers of said court.

AMERICAN BRIDGE COMPANY,
Libellant,
against

The Tug "GLORIA O" and GLORIA O TOWING CORPORATION,
Respondents.

Motion for a Writ of Prohibition and/or a Writ of Mandamus.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition of the Gloria O Towing Corporation, verified the 16th day of July, 1951, and on the proceedings and record in the case of American Bridge Company, libellant, against the Tug "Gloria O" and Gloria O Towing Corporation, respondents, now pending in the United States District Court for the Eastern District of New York, the undersigned will move this Court at a Stated Term hereof to be held at the United States Court House, Foley Square,

Motion for a Writ of Prohibition and/or a Writ of Mandamus.

Borough of Manhattan, City of New York, on the 8th day of October, 1951, at the opening of Court on said date or as soon thereafter as counsel can be heard for a writ of prohibition and/or a writ of mandamus directed to the Honorable Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York and all other judges and officers of said Court, in accordance with the prayer of said petition, and for such other and further relief in the premises as may be just.

Dated, New York, New York, July 16, 1951.

Yours, etc.,

PURDY, LAMB & CATOGGIO,

By VINCENT A. CATOGGIO,
Proctors for the Gloria O Towing Corporation.

To:

Honorable MORTIMER W. BYERS,
Judge of the District Court of the United States for the Eastern District of New York, and all other Judges of said Court.

PERCY G. B. GILKES, Esq.,
Clerk of the District Court of the United States for the Eastern District of New York.

KIRLIN, CAMPBELL & KEATING, Esqs.,
Proctors for Libellant.

Petition for a Writ of Prohibition and/or a Writ of Mandamus.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of the

Petition of the GLORIA O TOWING CORPORATION for a writ of prohibition and/or a writ of mandamus, against the Honorable Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York, and all other judges and officers of said court.

AMERICAN BRIDGE COMPANY,
Libellant,

against

The Tug "GLORIA O" and GLORIA O TOWING CORPORATION,
Respondents.

To the Honorable the Judges of the United States Court of Appeals for the Second Circuit:

The petition of the Gloria O Towing Corporation respectfully shows:

FIRST: The petitioner is a corporation organized and existing under and by virtue of the laws of the State of New York and at the times mentioned owned the Tugboat "Gloria O".

SECOND: On or about August 5th, 1950, American Bridge Company, a New Jersey corporation, filed in the United States District Court for the Eastern District of New York, a libel in Admiralty against the Tug "Gloria O" in rem and against the Gloria O Towing Corporation in personam.

THIRD: The libel aforementioned alleges that the libellant owned a bridge in the process of being built across the New York State Barge Canal near Jordan, New York, and that on the morning of May 10th, 1950, the Tug "Gloria O" with a barge in tow negligently collided with bridge supports causing damage to the bridge and to the supports. The libel prayed that process be issued in rem against the tug and in personam against the tug's owners.

FOURTH: The petitioner was required to and did file in Court a Surety Company undertaking in the sum of $17,500 in lieu of the seizure of the Tug "Gloria O" under Court Process, and that stipulation is still in full force and effect.

FIFTH: The petitioner has filed claim to the tug as owner and filed a notice of appearance, copies of which are hereto annexed.

SIXTH: On or about January 23rd petitioner filed in the United States District Court for the Eastern District of New York its answer to the libel herein and on the face of the said answer demanded a jury trial.

SEVENTH: The aforementioned answer to the libel, a copy of which is annexed hereto, expressly denies the Admiralty and Maritime jurisdiction of the United States and of the District Court and affirmatively alleges that the bridge supports, cribbing, piling and other material referred to in the libel, blocked, impeded and embarrassed

navigation, were an unlawful obstruction to navigation, were in violation of law and without legal authority and that the libellant assumed the risk of any damage to these objects. The aforementioned answer concludes "WHEREFORE, claimant-respondent prays that the issues in this action be tried before a jury and that the libel be dismissed together with costs and disbursements."

EIGHTH: On May 23rd, 1951, petitioner made a motion before District Judge Mortimer W. Byers for an order dismissing the libel as against the Tug "Gloria O" and discharging and cancelling the stipulation for value filed by the claimant of the tug as security for the tug and ordering and directing the libel against the respondent Gloria O Towing Corporation to be treated as a complaint in law and transferring the case from the Admiralty calendar to the Civil Jury Trial calendar and for such other and further relief in the premises as may be just and proper. By affidavit accompanying the said notice of motion it was shown that only because of Public Law 695 of the 80th Congress, June 19th, 1948, 46 U. S. C. 740, does the libellant have any color of right to prosecute this action in Admiralty. The said Statute attempted to extend Admiralty jurisdiction to claims for damage to land structures. The said affidavit pointed out that enforcement of the Statute herein will result in depriving claimant-respondent of its constitutional right to a jury trial and that the demand for a jury trial appearing on the face of the answer to the libel seems to be required under the decision of the Court of Appeals of the Second Circuit in *United States* v. *The Tug John R. Williams*, 144 Fed. (2d) 451 at 454.

NINTH: Under date of June 18th, 1951, the District Court filed its decision and opinion in writing, a copy of which is annexed hereto, and denied claimant-respondent's

motion in all respects. Under date of July 2nd, 1951, an order was entered, a copy of which is attached hereto, which denied the said motion.

TENTH: Petitioner represents that at the time of the adoption of the Constitution of the United States, claims for damage to structures or things attached to the land were not within the Admiralty jurisdiction and such claims down to and including the present time continue to be outside of the Admiralty jurisdiction; that the Congress had no power under the Constitution of the United States either to enlarge the jurisdiction of Admiralty or to deprive petitioner of its right to a jury trial nor did nor does the Congress have power or authority to deprive petitioner of its defenses of contributory negligence and assumption of risk as complete bars to the instant action.

ELEVENTH: Petitioner further represents that under the Judicial Code, 28 U. S. C. 1651, this Court has jurisdiction to grant the relief prayed for herein for which no prior application has been made.

WHEREFORE, petitioner prays for the aid of this Honorable Court and,

1. That a Writ of Prohibition may issue out of this Honorable Court to the Honorable Mortimer W. Byers, Judge of the United States District Court for the Eastern District of New York, and all other judges and officers of said Court, prohibiting him and them from taking any step whatsoever in the cause aforesaid and, generally, from the further exercise of jurisdiction herein or the enforcing of any order, judgment or decree made under color thereof.

2. That a Writ of Mandamus may issue out of this Honorable Court directing and commanding the Honorable

Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York and/or the other judges of said Court, to vacate the order entered by direction of the said Honorable Mortimer W. Byers denying petitioner's motion to dismiss the libel, to discharge the stipulation for value and to transfer the case from the Admiralty calendar to the Civil Jury Trial calendar, and to enter an order granting to petitioner the said relief.

3. That the Court grant to the petitioner such other and further relief as may be just in the premises.

PURDY, LAMB & CATOGGIO,

By: VINCENT A. CATOGGIO,
Proctors for the Petitioner.

State of New York,
County of New York, } ss.:

VINCENT A. CATOGGIO, being duly sworn, deposes and says:

I am an Attorney and a member of the firm of Purdy, Lamb & Catoggio, Proctors for the Gloria O Towing Corporation, Respondent and Claimant of the Tug "Gloria O."

I have read the foregoing Petition by me subscribed and the facts therein stated are true to the best of my information and belief.

VINCENT A. CATOGGIO.

Sworn to before me this
16th day of July, 1951.

CATHARINE S. QUERREAUX,
Notary Public in the State of N. Y.

Libel and Complaint.

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The libel of American Bridge Company against the Tug "Gloria O," her engine, boiler, tackle, etc., and Gloria O Towing Corporation in a cause of damage, civil and maritime, alleges upon information and belief as follows:

FIRST: Libellant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and on May 10, 1950 was the owner of a bridge in the process of being built across the New York State Barge Canal near Jordan, New York.

SECOND: The Tug "Gloria O" is now, or will be during the pendency of process hereunder, within this district and within the jurisdiction of this Honorable Court.

THIRD: At all the times hereinafter mentioned Gloria O Towing Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York with an office and place of business at 730 Forest Avenue, Staten Island, New York and was and is the owner of the Tug "Gloria O".

FOURTH: On the morning of May 10, 1950 the Tug "Gloria O", towing the Barge "Lawrence J. Tomlinson" in push-boat fashion and proceeding eastward, negligently brought the "Lawrence J. Tomlinson" into collision with bridge supports of the bridge owned by and in the process of being built by libellant, causing damage to the bridge supports and to the bridge, loss of tools and material, and loss, expense and delay both in repairing the damaged bridge supports and damaged bridge and in completing the bridge.

FIFTH: The aforesaid collision and the damages resulting therefrom were not caused or contributed to by

any fault or negligence on the part of the libellant, but was caused solely by and due wholly to the fault and negligence of the Tug "Gloria O" in the following respects, among others, which will be shown at the trial.

1. She was not maintaining a proper lookout.

2. She was not maintaining any lookout aboard the "Lawrence J. Tomlinson".

3. The persons in charge of her navigation failed to give proper orders in connection therewith.

4. She was not in charge of competent persons.

5. The persons in charge of her navigation were not attentive to their duties.

6. She failed to navigate clear of the bridge.

7. She failed to stay in the channel.

8. She failed to maneuver her engine properly or to make such use of her rudder as could be made in order to avoid collision.

9. She was proceeding at an excessive rate of speed.

10. She failed to navigate carefully in accordance with instructions of the state canal authorities.

11. She failed to take such other and further steps as she could or should have taken to avoid the collision.

SEVENTH: By reason of the premises the libellant has sustained damages upwards of Twenty Thousand ($20,000) dollars, no part of which has been paid.

EIGHTH: All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Tug "Gloria O", her engines, boiler, tackle etc., and against Gloria O Towing Corporation that Gloria O Towing Corporation and all persons having or claiming to have any interest in the Tug "Gloria O" be cited to appear and answer under oath all and singular the matters aforesaid; that libellant may have a decree against the Tug "Gloria O", her engine, boiler, tackle, etc., and against Gloria O Towing Corporation for its damages as aforesaid together with interests and costs; that the said Tug "Gloria O", her engine, boiler, tackle, etc., be condemned and sold to satisfy said decree; and that the libellant may have such other, further and different relief as may be just.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for Libellant,
Office & P. O. Address,
120 Broadway,
Borough of Manhattan,
New York 5, New York.

(Verified August 4, 1950.)

Claim of Owner.

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

AMERICAN BRIDGE COMPANY, *Libellant,* against Tug "GLORIA O," *Respondent.*	Ad. 19533

AND Now comes Gloria O Towing Corporation as owner of the Tug "Gloria O" intervening for the interest of itself in the said above entitled action appears before the Honorable Court, and makes claim to the said Tug "Gloria O" &c., as an action has been instituted in this Court, at the instance of libellant and the said Gloria O Towing Corporation avers that it was in possession of the said Tug "Gloria O" at the time of the happening of the occurrence stated thereof, and that the above mentioned is the true and bona fide owner of the said Tug "Gloria O" and that no other person or corporation is owner thereof wherefore it prays to defend accordingly.

GLORIA O TOWING CORPORATION,
By: OLE ODEGAARD.

Sworn to and subscribed this 9th day of August, A. D. 1950, before me.

CATHARINE S. QUERREAUX,
Notary Public in the State of N. Y.

PURDY, LAMB & CATOGGIO,
Proctors for Claimant,
80 Broad Street,
New York City.

Notice of Appearance.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

AMERICAN BRIDGE COMPANY, *Libellant,* against Tug "GLORIA O," her engines, boilers, tackle, etc., and GLORIA O TOWING CORPORATION, *Claimant-Respondent.*	Ad. 19533

Sirs:

PLEASE TAKE NOTICE that the respondent, Gloria O Towing Corporation, hereby appears herein and that we are retained as its proctors, and hereby demand that you serve upon us copy of all pleadings in this proceeding at our office designated below.

Yours, etc.,

PURDY, LAMB & CATOGGIO,
Proctors for Claimant-Respondent,
Office and P. O. Address,
80 Broad Street,
New York 4, New York.

To:

MESSRS. KIRLIN, CAMPBELL, HICKOX & KEATING,
120 Broadway,
New York 5, New York.

Answer to Libel With Jury Demand.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

AMERICAN BRIDGE COMPANY, *Libellant*, against The Tug "GLORIA O" and GLORIA O TOWING CORPORATION, *Respondents.*	Respondent and Claimant-Respondent Demands a Jury Trial A. 19533

The answer of Gloria O Towing Corporation, respondent and claimant-respondent, to the libel of the American Bridge Company, respectfully alleges on information and belief:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations of article FIRST.

SECOND: Admits the allegations of article SECOND.

THIRD: Admits the allegations of article THIRD.

FOURTH: Denies the allegations of article FOURTH.

FIFTH: Denies the allegations of article FIFTH.

SIXTH: Denies the allegations of article SEVENTH.

SEVENTH: Denies the allegations of article EIGHTH, and expressly denies the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

FURTHER ANSWERING, AND AS AN AFFIRMATIVE DEFENSE, RESPONDENT AND CLAIMANT-RESPONDENT ALLEGES ON INFORMATION AND BELIEF:

EIGHTH: The bridge supports, piling, cribbing and other material referred to by the libellant in the libel blocked, impeded and embarrassed navigation and they were an unlawful obstruction to navigation and they were placed in position by the libellant in violation of law and without legal authority, permission or license. By placing fixed obstructions to navigation in the channel of the New York State Barge Canal the libellant assumed the risk of any damage to these objects.

WHEREFORE claimant-respondent and respondent prays that the issues in this action be tried before a jury and that the libel be dismissed together with costs and disbursements.

PURDY, LAMB & CATOGGIO,
Proctors for Respondent
and Claimant-Respondent,
Office and P. O. Address,
80 Broad Street,
New York 4, New York.

(Verified January 19, 1951.)

Notice of Motion.

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the pleadings and proceedings heretofore had herein and upon the annexed affidavit of Vincent A. Catoggio, sworn to January 29th, 1951, the undersigned will make a motion at a Term of this Court to be held for the hearing of motions in the United States Courthouse, Washington Street, Borough of Brooklyn, City and State of New York, on the 7th day of February at 10:30 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the libel as against the Tug "Gloria O" and discharging and cancelling the stipulation for value filed by the claimant on that tug as security for the tug and ordering and directing that the libel against the Gloria O Towing Corporation be treated as a complaint in law and transferring the case from the Admiralty calendar to the Civil Jury Trial calendar, and for such other and further relief in the premises as may be just and proper.

PURDY, LAMB & CATOGGIO,
Proctors for Claimant-Respondent,
Office and P. O. Address,
80 Broad Street,
New York 4, New York.

To:

Messrs. KIRLIN, CAMPBELL & KEATING,
Proctors for Libellant,
120 Broadway,
New York, N. Y.

Hon. PERCY G. B. GILKES,
Clerk.

Affidavit of Vincent A. Catoggio, Read in Support of Motion.

[SAME TITLE]

State of New York, }
County of New York, } ss.:

VINCENT A. CATOGGIO, being duly sworn, deposes and says:

That he is an attorney and member of the firm of Purdy, Lamb & Catoggio, proctors for claimant-respondent herein.

This affidavit is submitted in support of a motion for an order dismissing the libel against the Tug "Gloria O" and cancelling and discharging of record security filed in this Court in lieu of the seizure of that tug and for an order directing that the libel against Gloria O Towing Corporation be deemed a complaint in law and for an order transferring the case from the Admiralty calendar to the Civil Jury calendar for trial.

The action is one in Admiralty against the Tug "Gloria O", and her owners, for damage to piling and cribbing affixed to the land under the waters of the New York State Barge Canal near Jordan, New York. The libel alleges that the libellant "was the owner of a bridge in the process of being built across the New York State Barge Canal near Jordan, New York" and it seeks to recover for damage to this so-called bridge on the ground that the Tug "Gloria O" collided with it, its piling and cribbing.

Only because of Public Law 695, June 19th, 1948, 46 U. S. C. 740, does the libellant have any color of right to institute this action in Admiralty. The aforementioned Statute it will be recalled made effort to extend Admiralty jurisdiction to claims for damage to land structures. Claimant-respondent takes the position that this Court still lacks jurisdiction in Admiralty herein and that it is entitled to a Jury Trial of the issues raised by the plead-

ings. The answer to the libel denies the Admiralty jurisdiction of this Court in the premises.

Enforcement of the Statute will result in depriving claimant-respondent of a right to a Jury Trial and such procedure would deprive the claimant-respondent of its constitutional right.

The answer to the libel contains on its face a demand for a Jury Trial. The Clerk of this Court was reluctant to file the answer containing such a demand, but after deponent communicated with District Judge Inch the answer was filed and deponent was advised to make the instant motion.

The procedure being followed herein is that which seems to be required under the decision of the Court of Appeals for the Second Circuit in *United States* v. *The John R. Williams*, 144 Fed. (2d) 451, wherein the Court indicated at page 454 that where Admiralty jurisdiction is contested on the ground that it works a deprivation of the right to a Jury Trial, it is necessary to lay a proper foundation for a Jury Trial before the Court of Appeals will give relief in a case improperly instituted in Admiralty.

We believe the problem here presented and the attack on the constitutionality of the application of Public Law 695 is a matter of first impression.

WHEREFORE deponent prays for an order dismissing the libel as against the Tug "Gloria O" and discharging and cancelling the stipulation for value filed by the claimant on that tug as security for the tug and ordering and directing that the libel against the Gloria O Towing Corporation be treated as a complaint in law and transferring the case from the Admiralty calendar to the Civil Jury Trial calendar, and for such other and further relief in the premises as may be just and proper.

VINCENT A. CATOGGIO.

(Sworn to January 29, 1951.)

Opinion.

[SAME TITLE]

June 18, 1951.

KIRLIN, CAMPBELL & KEATING, Esqs., proctors for libellant (Robert S. Erskine and John H. Hanrahan, Jr., Esqs., of counsel) opposed.

PURDY, LAMB & CATOGGIO, Esqs., proctors for claimant-respondent (Vincent A. Catoggio, Esq., of counsel) for motion.

BYERS, D. J.:

This is a motion to dismiss a libel against the Tug "Gloria O", and her owner in personam, and to discharge and cancel a stipulation for value, and to direct that the libel be treated as a complaint at law, and to transfer the cause to the civil jury trial calendar. With the answer there was filed a demand for jury trial—in deference to a statement in the opinion in *United States* v. *The John R. Williams et al.*, 144 F. 2d 451, to the effect that such a trial had there been waived for failure of such demand.

This cause is for damage said to have been done to libellant's bridge structure and supports resulting from the striking thereof by the tug and her tow, in the Barge Canal at Jordan, N. Y., on May 10, 1950.

The claimant's purpose is to challenge the constitutionality of the Act of June 19, 1948, Ch. 526 (Title 46 U. S. C. 740) which in terms provides: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. * * *"

The statute thus supplants several decisions to the effect

that under such circumstances a maritime tort has not been committed.

The libel sufficiently alleges that the damage complained of was done or consummated on land so far as the bridge and supports were concerned.

While in terms this motion does not seek an "injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States * * *" within Title 28 U. S. C. § 2282, such would seem to be the necessary effect of granting the motion, and perhaps therefore this Court of one judge should not proceed to a decision. Since the subject has not been discussed in oral or written argument, it will be sufficient if the point is hereby reserved for consideration upon appeal which of course is inevitable in one form or another.

The claimant's argument, if understood, is that at the time of the adoption of the Constitution, the language of Art. III, Sec. 2, defining the judicial power as extending "* * *; to all cases of admiralty and maritime jurisdiction"; necessarily restricted that jurisdiction to the then contemporary concepts of its constituency which Congress was powerless to extend by any subsequent legislation. Therefore that the attempt in 1948 to recognize jurisdiction of the courts sitting in admiralty to adjudicate this case must fail for lack of congressional power.

The claimant cites the Seventh Amendment concerning suits at common law where the value in controversy exceeds twenty dollars (as here) "the right of jury trial shall be preserved * * *".

It is argued that since this cause was cognizable at common law only prior to 1948, according to many decisions, it follows that the deprivation of a jury trial (for which the new statute makes no provision) necessarily is an additional source of invalidity.

The further argument is made that the claimant is deprived of its right to require the libellant to establish

freedom from contributory negligence under the rule in New York which would apply if the case were to be tried at common law; and that the doctrine of assumption of risk would also deprive libellant of recovery in such a suit. These are scarcely constitutional rights, for they could be changed at any time by state legislation, and will not be discussed.

Each cognate exercise of the congressional function residing in "the necessary and proper power" (Art. I, Sec. 8) has met and survived the challenge of those who asserted the same position as is here argued by the claimant. It would display temerity to recite again all that is contained in the historic survey of the development of admiralty jurisdiction in the United States, written by Chief Justice Hughes in *Detroit Trust Co., Trustee* v. *The Thomas Barlum et al.*, 293 U. S. 21, at 42, *et seq.*, in expounding the validity of the preferred Ship Mortgage Act. While the decision itself was addressed to different subject-matter, the force of the following statement is not thereby impaired: (p. 43) "When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in Congress to modify or supplement it as experience or changing conditions might require.' *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 385-387. The Congress thus has paramount power to determine the maritime law which shall prevail throughout the country (citing cases). But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction. *The Belfast*, 7 Wall. 624, 641; *Panama Railroad Co.* v. *Johnson, supra; Crowell* v. *Benson* (285 U. S. 22, 39)."

Those latter cases did not involve such subject-matter as is here in controversy.

In upholding a recovery under the Jones Act, by a seaman injured while ashore in performing his duties in discharging cargo, Chief Justice Stone said in *O'Donnell* v.

Great Lakes Dredge & Dock Co., 318 U. S. 36, at page 40, in discussing the apparent contention that the maritime law at the time of the adoption of the Constitution should remain unaltered: "There is nothing in that grant of jurisdiction—which sanctioned our adoption of the system of maritime law—to preclude Congress from modifying or supplementing the rules of that law as experience or changing conditions may require. This is so at least with respect to those matters which traditionally have been within the cognizance of admiralty courts either because they are events occurring on navigable waters, see *Waring* v. *Clark* (5 How. 441), or because they are the subject matter of maritime contracts or relate to maritime services. *Insurance Co.* v. *Dunham*, 11 Wall. 1, 25."

"From the beginning this Court has sustained legislative changes of the maritime law within those limits" (citing cases).

I have been unable to find any decision, nor have counsel cited any, in which an Act of Congress, adopted pursuant to the quoted part of Art. III, Sec. 2, has been held invalid as transcending constitutional power thereby imparted.

Perhaps the observation of Mr. Justice Holmes in *The Blackheath*, 195 U. S. 361 at page 365, affords one explanation for the lack of such negative decisions: "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." He proceeds to illuminate both subjects in the passages which follow the quotation. That case upheld jurisdiction in an admiralty suit by the Government against a vessel which ran into a beacon in a channel, which was attached to the bottom. Recovery was sustained because the beacon was an aid to navigation. Mr. Justice Brown concurred, stating that in his view earlier cases were thereby overruled, namely, *The Plymouth*, 3 Wall. 20, *Phoenix Insurance Co.* v. *U. S.*, 118 U. S. 610, and *Chicago & Pacific Elevator Co.*, 119 U. S. 388, which denied recovery for damage inflicted by a vessel upon land

structures, upon the principle "that the jurisdiction of the admiralty does not extend" to such injuries.

That view, however, did not find acceptance in the later cases of *Cleveland Terminal R. R.* v. *Cleveland Steamship Co.*, 208 U. S. 316, *Martin* v. *West*, 222 U. S. 191 (in which recovery in a state court, under state law, was upheld although the tort was non-maritime under cited cases), and *The Panoil*, 266 U. S. 433.

It is not without significance that the limited liability statute (Title 46 U. S. C. § 183) has been construed to apply to non-maritime torts, *Richardson* v. *Harmon*, 222 U. S. 96, and this is referred to at page 44 of the *Detroit Trust Co.* case, *supra;* to some extent, therefore, the exercise of congressional power as manifested in that statute has been held efficacious to bring into concourse a claim not cognizable in the admiralty according to *The Plymouth*, *supra*, and its progeny. Whether this can be thought of as an unconscious and indirect exercise of the challenged power, it is at least consistent with a recognition by Congress in 1948 that there was reason to clarify a situation which had become somewhat complicated by distinctions not indubitably present in the "admiralty and maritime jurisdiction" referred to in the Constitution, and which seem hard to reconcile on strictly logical grounds. That is presently deemed to have been the congressional purpose, rather than the assertion of new and alien functions, which would lie exterior to the intent and purpose of the fundamental compact.

Nor is it seen that such a construction invades any natural right of the claimant. Its tug was engaged in the performance of a maritime task upon navigable waters, and to restrict accountability for a collision to common law remedies, merely because of the incidence of the damage said to have resulted from the character of the tug's handling, would seem to be strained and artificial at best. The discussion in *United States* v. *The John R. Williams*

et al., 144 F. 2d 451, of the divergent holdings in such matters is thought to justify this view.

The remaining comment by claimant on the subject of a jury trial, as prescribed in the 1845 statute extending the jurisdiction of the District Courts sitting in admiralty so as to embrace causes arising upon lakes, etc., seems to indicate a contention that the absence of such a provision in the 1948 statute renders it invalid. That does not accord with the language of Chief Justice Taney in the *Genesee Chief*, 12 How. 443, at page 459, in upholding that statute, where he points out that Congress was free to provide for a jury trial in the admiralty in virtue of its control over the general subject described in the clause which has been quoted, thus: "The grant defines the subjects to which jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases, there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice." In that case, moreover, neither party sought a jury trial.

The language quoted does not even suggest that, in adopting the instant statute, Congress was constrained to provide for a jury trial, or that, as the claimant's brief has it, "* * * the right to a jury trial, saved the Statute from successful attack on constitutional grounds" (citing the *Genesee Chief* case, *supra*). That statement is completely unsupported by the opinion from which the quotation was taken.

I do not understand the *Williams* case, *supra*, at page

454, to suggest that a jury trial would have been appropriate there. Attention was called merely to the fact that respondent seemingly did not regard the case as properly a suit at common law, since no jury trial had been demanded. That was not to say that a different decision would have been reached if the anomalous procedure had been sought of asking that a jury be summoned to try in the admiralty a cause which the court held to involve a non-maritime tort.

It results from the foregoing that claimant's motion is denied in all respects.

Settle order.

M. W. B.,
U. S. D. J.

Order Denying Motion to Dismiss Libel, Etc.

[SAME TITLE]

Claimant-respondent having moved for an order dismissing the libel as against the Tug "Gloria O" and discharging and cancelling the stipulation for value filed by the claimant on that tug as security for the tug and ordering and directing that the libel against the Gloria O Towing Corporation be treated as a complaint in law and transferring the case from the Admiralty calendar to the Civil Jury Trial calendar, and the Court having heard counsel for the respective parties, and having filed its opinion, it is

ORDERED that said motion be and is hereby denied in all respects.

Dated, Brooklyn, N. Y., July 2, 1951.

MORTIMER W. BYERS,
U. S. D. J.

[fol. 25] Motion Denied. T.W.S. J.N.F. A.C.C. JJ.

November 15, 1951.

[fol. 26] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of November, one thousand nine hundred and fifty-one.

Present: Hon. Thomas W. Swan, Chief Judge, Hon. Jerome N. Frank, Circuit Judge, Hon. Alfred C. Coxe, District Judge, Gloria O Towing Corporation, Petitioner, v. Hon. Mortimer W. Byers, U.S.D.J., Respondent.

A petition for a writ of prohibition and/or writ of mandamus having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 27] [Endorsed:] United States Court of Appeals, Second Circuit. Gloria O Towing Corp. v. Hon. Mortimer W. Byers, U.S.D.J. Order. United States Court of Appeals, Second Circuit. Filed Nov. 15, 1951. Alexander M. Bell, Clerk.

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

TABLE OF CONTENTS.

PAGE

I. THE PRESENT STATUS OF THE LITIGATION, AND THE QUESTION INVOLVED, DO NOT SUPPORT THE EXTRAORDINARY PROCEDURE PRAYED FOR BY PETITIONER..... 1

II. THERE IS NO EMERGENCY REQUIRING AN IMMEDIATE REVIEW BY THIS COURT FOR PROPER PROTECTION OF THE PETITIONER'S RIGHTS..... 5

III. THE PETITION SHOULD BE DENIED..... 6

APPENDIX 1a

Cases Cited.

	PAGE
Atlee v. *Packet Co.*, 88 U. S. 389	5
Doullut v. *United States*, 268 U. S. 33	5
Ex Parte Harding, 219 U. S. 363	4
Ex Parte Roe, 234 U. S. 70, 73	4
Halcyon Lines v. *Haenn*, October Term 1951, Nos. 62 and 197, decided Jan. 14, 1952	6
I. C. C. v. *United States*, 289 U. S. 385	4
In re Pennsylvania R. Co., 48 F. (2d) 559 Cert. denied 284 U. S. 640	6
Prince Line v. *American Paper Exports*, 55 F. (2d) 1053	6
Roberts v. *U. S. District Court*, 338 U. S. 844, 845	3
Roche v. *Evaporated Milk Ass'n.*, 319 U. S. 21, 26	3
United States v. *Bondy*, 171 F. (2d) 642	4
United States v. *Rabb*, 147 F. (2d) 225	4
United States v. *Tug John R. Williams*, 144 F. (2d) 451 Cert. denied 323 U. S. 782	6
United States Code, Congressional Service, 80th Congress, Second Session 1948, Vol. 2, pages 1898-1904	7

Statute Cited.

Act of Congress of June 19th, 1948, Ch. 526 (Title 46, U. S. Code, sec. 740) 2, 5, 7, 1a

IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 353M—ORIGINAL.

IN THE MATTER

of

The Petition of the GLORIA O TOWING CORPORATION for a writ of prohibition and/or a writ of mandamus, against the Honorable Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York, and all other Judges and officers of said Court, and for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE ABOVE-NAMED RESPONDENTS AND AMERICAN BRIDGE COMPANY, IN OPPOSITION TO THE PETITION.

I.

THE PRESENT STATUS OF THE LITIGATION, AND THE QUESTION INVOLVED, DO NOT SUPPORT THE EXTRAORDINARY PROCEDURE PRAYED FOR BY PETITIONER.

Petitioner is seeking to have this Court review and reverse a non-final order entered by the Honorable Mortimer W. Byers, Judge of the District Court of the United

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It is assumed that petitioner's failure to include American Bridge Company with the other respondents named in the motion papers was an oversight. American Bridge Company, as libelant in the District Court, is a party to the proceedings.

States for the Eastern District of New York, in a suit in admiralty, by American Bridge Company, libelant, against the tug *Gloria O* and Gloria O Towing Corporation, claimant-respondent. The said order over-ruled petitioner's motion to dismiss the libel on exceptions to the admiralty and maritime jurisdiction of the Court (R. 13, 15-17; 24).

The libel against the tug *Gloria O, in rem,* and her owner *in personam,* (R. 8-10) is for damage allegedly caused by the tug's negligence in colliding with certain pilings which were imbedded in the New York State Barge Canal and which supported structure used in the course of American Bridge Company's construction of a bridge across the Canal.

The jurisdiction of the District Court in admiralty over the subject matter of the suit rests upon the provisions of the Act of Congress of June 19th, 1948, Ch. 526, (Title 46, U. S. Code sec. 740), which extended the admiralty and maritime jurisdiction of the United States to include "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."*

Despite the confusion created by petitioner's frequent injection of references to trial by jury, and to the defense of contributory negligence under the law of New York State, the sole question involved in the District Court's order over-ruling petitioner's exceptions to the admiralty jurisdiction is whether Congress exceeded its constitutional powers in its aforesaid legislative enactment. If the Act is constitutional, and the admiralty jurisdiction exists, then petitioner's arguments of trial by jury, and contributory negligence, are irrelevant.

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* The text of the Act is printed in full in the Appendix to this brief.

The order which Judge Byers entered, upon his ruling that the aforesaid Act is constitutional (R. 18-24), was not a final order in the litigation, and, as the order sustained the Court's jurisdiction, there is no interference with appellate jurisdiction in regular course of procedure. It would seem, therefore, that, under the decisions of this Court, the situation does not call for the extraordinary procedure prayed for by the petitioner in its attempt to obtain a shortcut.

In *Roberts* v. *U. S. District Court*, 339 U. S. 844, at page 845, this Court said

> "Mandamus is an extraordinary remedy, available only in rare cases."

In *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, this Court said:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. * * * Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal." (At page 26.)
>
> "For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. * * * And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, * * * or denying a nonsuit * * * despite the inconvenience to petitioner of being

forced to proceed to trial in advance of a review of the court's action." (At pages 30-31.)

"In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court." (At page 32.)

In *Ex Parte Roe*, 234 U. S. 70, at page 73, this Court said:

"The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal."

To the same effect: *Ex Parte Harding*, 219 U. S. 363; *I. C. C.* v. *United States*, 289 U. S. 385; *United States* v. *Bondy*, 171 F (2d) 642; *United States* v. *Rabb*, 147 F (2d) 225.

Aside from the procedural limitations indicated by the foregoing authorities, the review which petitioner is seeking here is premature, by reason of the following circumstances.

(a) A trial of the suit in admiralty might result in a decision that the *Gloria O* was not guilty of negligent navigation, and that the libel should be dismissed.

(b) The proofs offered upon a trial in admiralty might develop that the pilings with which the *Gloria O* collided not only served to support libelant's bridge construction work, but also served as an aid to navigation, with lights

thereon, to guide and protect passing vessels; and that an Admiralty Court would thereby have jurisdiction, irrespective of the Act of Congress now in question. *Doullut* v. *United States,* 268 U. S. 33.

In either of the foregoing events, the question of the constitutionality of the Act of June 19th, 1948 (Title 46 U. S. Code sec. 740) would become moot.

II.

THERE IS NO EMERGENCY REQUIRING AN IMMEDIATE REVIEW BY THIS COURT FOR PROPER PROTECTION OF THE PETITIONER'S RIGHTS.

It is reasonably apparent that petitioner's attack upon the admiralty jurisdiction is prompted principally by the hope that, at Law, contributory negligence of American Bridge Company might be established as a complete defense under the applicable law of New York State. Even if there be any merit in the arguments on which petitioner seeks to obtain that result by ousting the admiralty jurisdiction, nevertheless, there is nothing detrimental to the petitioner's rights in requiring the petitioner to proceed with a trial in admiralty and seek a review of Judge Byers' ruling and order by normal appellate procedure, if that becomes necessary.

Admiralty does not shut its eyes to a defense of contributory negligence. Upon a trial of the case in admiralty, your petitioner can present all available proofs to support either complete exoneration of the tug *Gloria O* or contributory negligence of the libelant, and if contributory negligence is proven, it will reduce libelant's recovery to fifty per cent, under the applicable law of admiralty in collision cases of this type. *Atlee* v. *Packet Company,* 88

U. S. 389, at page 395; *Halcyon Lines* v. *Haenn et al.* ..... U. S. ....., October Term 1951, Nos. 62 and 197, decided January 14th, 1952; *In re Pennsylvania R. Co.*, 48 F (2d) 559, 565-566, cert. denied, 284 U. S. 640. If, thereafter, the Appellate Courts should rule that the Act of Congress involved herein is unconstitutional, and that the District Court was without jurisdiction in admiralty, they could view the entire proceeding as an action at Law, and thereby give immediate effect to the complete defense of contributory negligence, at Law, under any finding of the Admiralty Court that there was contributory negligence. *Prince Line Ltd.* v. *American Paper Exports*, 55 F(2d) 1053, 1057, *United States* v. *The John R. Williams*, 144 F(2d) 451; cert. denied, 323 U. S. 782.

There is no support for, or merit in, petitioner's present contention that it must either stand mute at a trial in admiralty, or forfeit its rights. (Petition, p. 8.) There is nothing to justify petitioner's contention that the petition presents "an issue fundamental to the further conduct of the case", or to make the present matter comparable to the cases cited in support of that contention. (Notice of Motion, p. 2.)

III.

The petition should be denied.

The immediate question is whether this Court should issue an order to show cause, or a writ of certiorari, as prayed for by the petitioner. For the reasons already stated, the respondents named in the petition, and American Bridge Company, believe that the petition should be denied.

It is assumed, however, that if the petition is granted with respect to either portion of its prayer, the respondents

named in the petition, and American Bridge Company, will be granted an opportunity to brief and argue the constitutionality of the Act of Congress which is involved, and which received Judge Byers' careful consideration (R. 18-24).

Without briefing that question at this time, the Court's attention is directed to the fact that the Act (Title 46, U. S. Code, sec. 740) was intentionally enacted by Congress to extend or enlarge the interpretation of the admiralty jurisdiction set forth in the earlier decisions of the Courts, which have been cited on pages 11 and 12 of petitioner's brief. The background of the enactment and the approval of it given by the Attorney General and the Secretary of the Navy are fully set forth in U. S. Code Congressional Service, 80th Congress, Second Session, 1948, Vol. 2, pages 1898-1904.

Respectfully submitted,

ROBERT S. ERSKINE,
Attorney for Respondents named in the Petition herein, and for American Bridge Company.

JOHN H. HANRAHAN, JR.,
Of Counsel.

APPENDIX.

Title 46, United States Code, Section 740, reads as follows:

> "Sec. 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.
>
> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> "In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496."